No. 15993

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

GERTRUDE L. BRAWNER,

*Appellant,*

*vs.*

PEARL ASSURANCE COMPANY, LTD., *et al.*,

*Appellees.*

---

**Appeal From the United States District Court for the Southern District of California, Central Division.**

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## APPELLEE'S BRIEF.

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## APPELLEE'S BRIEF.

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### I.
### Introductory.

For consistency appellee, Pearl Assurance Company, Limited, will respond to Appellant's Opening Brief in the order in which it is presented. In the belief that appellant has failed to meet squarely the real ground for the Honorable District Court Judge's judgment, appellee will conclude its brief with an analysis of this neglected ground.

### II.
### As to Chapters I and II of Appellant's Opening Brief —Jurisdiction.

Appellee agrees with appellant that the District Court of the United States had jurisdiction of this cause on the ground of diversity of citizenship and that this Honorable United States Court of Appeals has jurisdiction to review the judgment of the District Court.

## III.

## As to Chapter III of Appellant's Opening Brief—Statement of the Case.

Since appellant has stated some conclusions and argument as facts in this chapter of her opening brief, appellee feels constrained to briefly restate the case as follows:

The appellant prosecutes this appeal from the action of the District Court in denying her motion for summary judgment and granting appellee's motion for summary judgment and entering judgment denying appellant-insured recovery under a policy of fire insurance. Appellee issued the policy to appellant October 22, 1955, for a term of three years in the form prescribed by California Insurance Code, Sections 2070 and 2071, and by its terms undertook to insure appellant against loss by fire to a building situate at 125-127-127½ South Bunker Hill Avenue, Los Angeles, California [Tr. pp. 12-16, incl., and p. 18, par. I of Answer]. Certain rental insurance was also provided by the policy.

On February 7, 1957, a fire occurred which appellant alleges destroyed the insured building. Appellant reported the fire and demanded payment of $7,500.00, the limit of insurance on the building, plus $150.00 loss of rentals from the building [Tr. p. 50, par. II of Fdgs.]. Appellee rejected the claim for the alleged destruction of the building in its entirety. However, appellee admitted liability for and tendered payment of the loss of rentals and the rental claim has been paid by appellee and accepted by appellant since the filing of this appeal [Tr. p. 19, par III; p. 20, Par. IV].

Amongst grounds for denial of the claim involving the building, appellee pleaded affirmatively in its answer to the effect that appellant had suffered no loss because appellant's entire property at the Bunker Hill address, including the insured building, was in process of being condemned by the County of Los Angeles in an action in eminent domain pending at the time of the fire and soon after the fire the condemnation was completed by judgment and by condemnor's payment to appellant in accordance with the judgment of the full value of the property in its condition before the fire without diminution because of physical damage caused by the fire [Tr. p. 20, par. I].

The facts relating to appellee's defense are:

(a) At the time of the fire the whole of appellant's said property was being condemned by the County of Los Angeles, a political subdivision of the State of California, in Case No. 658,477, filed April 4, 1956, in the Superior Court of the State of California, in and for the County of Los Angeles. (Conceded by appellant's own motion for summary judgment [Tr. p. 25, par. I]; also Appellee's Exhibit "A" on file in this proceeding; also appellee's motion for summary judgment [Tr. pp. 22-23].)

(b) At a pre-trial hearing in the District Court, there were introduced into evidence as one exhibit certified copies of three documents from the condemnation action, they being documents entitled "Statement of Issues Agreed Upon for Pre-Trial Conference," "Stipulation for Judgment" and "Interlocutory Judgment," respectively, all admittedly relating to the property at 125-127-127½ South Bunker Hill Avenue [see original of Appellee's Ex. "A" on file in these proceedings]. In the document entitled "Statement of Issues," etc., and signed by the parties

Feb. 15, 1957, it was stipulated by the condemnor and the appellant herein in part as follows:

> ". . . it is agreed by and between . . . attorneys for plaintiff, County of Los Angeles, and . . . attorney for defendant, Gertrude L. Brawner, that the following matters are agreed upon and it will not be necessary to offer evidence in support thereof:
>
> * * * * * * * *
>
> 5. *That the date of valuation of the said property is April 4, 1956.*
>
> 6. *That the only issue not agreed upon is the market value of the said property as of April 4, 1956."* [Italics added for emphasis—see this document in Ex. "A," p. 1, lines 18-26; p. 2, lines 15-18.]

(c) Thereafter by the "Stipulation for Judgment" in the condemnation action, dated and signed March 26, 1957, it was agreed amongst other things:

> "It is hereby stipulated by and between plaintiff County of Los Angeles . . . and defendant Gertrude L. Brawner, . . . :
>
> "2. That the market value of said real property, together with any and all improvements thereon, including any and all severance damage which may be caused to other properties owned by said defendant by the taking thereof, is the sum of Twenty-Six Thousand Four Hundred Dollars ($26,400.00);
>
> "3. That the plaintiff may have an interlocutory judgment without further notice. . . ." [see p. 1, line 16, to p. 2, line 6 of document entitled "Stipulation for Judgment" in Ex. "A"].

(d) Thereafter on April 5, 1957, the Interlocutory Judgment was filed, in which it was provided in part:

> "2. That the market value of said real property, together with any and all improvements thereon, in-

cluding any and all severance damage which may be caused to the remainder of the said real property by the taking thereof is the sum of TWENTY-SIX THOUSAND FOUR HUNDRED DOLLARS ($26,400.00);" [see Ex. "A"].

(e) The decree then provided for the payment of the indicated sum to appellant herein and for the transfer of title to the County of Los Angeles. This sum was paid by the County to appellant herein April 12, 1957 [Tr. p. 33, second par., affidavit of appellant's counsel].

Following the filing of Exhibit "A" in evidence, appellee made its Motion for Summary Judgment on the ground that its defense was established by said exhibit and there was no genuine issue as to any material fact [see Motion, Tr. pp. 22-23]. The District Court granted the Motion, made Findings of Fact and Conclusions of Law accordingly [Tr. pp. 49-53] and gave judgment to appellee [Tr. pp. 53-54]. In Paragraph IV of its Findings of Fact the District Court found in some detail that appellee's defense as above outlined was true [Tr. p. 51].

Appellant's opposition to appellee's motion for summary judgment was, in substance, that the value agreed upon and decreed in the condemnation action was the value of the property at the time the judgment was entered and then only for the property actually taken by the condemnor [Tr. p. 42, subd. (d) of appellant's objections to findings proposed after motion for summary judgment]. The District Court found the records of the condemnation action to be contrary to this and refused to go behind the record.

## IV.

## As to Chapters IV, V and VI of Appellant's Opening Brief.

The summary of appellant's argument in Chapter IV of her brief suggests that appellant has either ignored or failed to grasp the true significance of appellee's first affirmative defense.

Appellee's precise position has always been and is now that its policy was an undertaking to indemnify appellant against loss actually sustained by her by reason of a fire to the property described in the policy and that because the fire which occurred did not cause her any loss, there was nothing to be indemnified. It is to be noted that the defense is not and never was predicated upon the theory that appellant had no insurable interest in the property at the time of the fire [see Appellant's Answer, Tr. pp. 18-21, particularly p. 20].

Chapters V and VI of Appellant's Opening Brief, being statements of appellant's position, require no comment.

## V.

## As to Chapter VII of Appellant's Opening Brief—Issues Involved:

Throughout this chapter, appellant argues the proposition that appellant had an insurable interest in the involved property at the time of the fire. No doubt appellant has been prompted to make this argument by a phrase in the District Court's Findings of Fact to the effect that appellant "had no insurable interest in the building at the time of its destruction" [Tr. p. 51, 1st par. of Par. IV]. The phrase in question is probably misleading when taken out of context. The District Court probably adopted it in

reference to the fact that appellant had sustained no loss, and not in reference to the proposition that appellant had no tangible insurable interest. Appellee's defense was and is in relation to the absence of a loss to be indemnified and it would appear logical that the District Court's use of this wording was in relation to the issues raised by the pleadings.

Appellee has no quarrel with the general principle that under ordinary circumstances liability for loss must be determined as of the time of the fire and that after-events such as change of ownership or interest will not alter the liability. These principles originate in cases dealing with the existence or the extent of any insurable interest at the time of the fire. In resolving such questions, the ownership and interest at the time of the fire must be held controlling, but it is submitted these principles do not change the established and salutary rule upon which appellee relies, which is cogently stated in 45 *Corpus Juris Secundum,* p. 1010, Section 915, as follows:

> "Since a contract for insurance against fire ordinarily is a contract of indemnity, as discussed supra Section 14, insured is entitled to receive the sum necessary to indemnify him, or to be put, as far as practicable, in the same condition pecuniarily in which he would have been had there been no fire; that is, he may recover to the extent of his loss occasioned by the fire, but no more, and he cannot recover if he has sustained no loss."

On page 7 of her brief, appellant recognizes the rule that contracts of insurance such as fire insurance policies are personal contracts and constitute an undertaking to indemnify the insured against a loss which he suffers.

Unfortunately, appellant abandons the subject at this point and digresses to cite some cases dealing with insurable interests. Thus, appellant quotes at length from *Vierneisel v. Rhode Island Insurance Co.*, 77 Cal. App. 2d 229. Actually this case involves a mere determination whether title had passed through escrow at the time of the fire and whether an assignment executed with respect to the policy affected its validity. Finally, the Court at page 233 appears to recognize that the insured must suffer a pecuniary loss (as contended by appellee herein) and found on the facts of the case that the insureds had. The foregoing appears representative of appellant's citations except for several decisions headed by *Alexandra Restaurant, Inc. v. New Hampshire Insurance Co.*, 273 App. Div. 436, 71 N. Y. S. 2d 515, mentioned on pages 12 to 14 of appellant's brief. These cases will be specifically discussed under a section of appellee's brief to follow.

Commencing on page 10 of her Opening Brief, appellant discusses the measure of indemnity under open policies. It is submitted the underlying fallacy of appellant's argument is that the insured must suffer a loss before this measure applies. By the very wording of Section 2051 of the California Insurance Code it is necessary that the fire must create an "*expense to the insured of replacing the thing lost or injured in its condition* at the time of injury . . ." (Italics ours.) It is appellee's contention that appellant was not caused the expense of replacing the thing lost or injured.

## VI.

## The District Court's Orders and Judgment Are Consistent With California Law and Supported by Sound Decisions.

### A. A Review of Pertinent California Law.

Neither party has been able to find a California decision directly in point. It should follow that this Honorable Court's consideration of the case should be limited to the question whether the District Court reached a permissible conclusion, not necessarily a correct one. If the question decided is a doubful one under California Law—one on which there can be justifiable differences of opinion—the judgment ought to be affirmed.

A consideration of pertinent California law shows that the orders and judgment of the District Court are not in opposition thereto.

For example, California Insurance Code, Section 250, to the effect that "Any contingent or unknown event, whether past or future *which may damnify a person having an insurable interest,* . . . may be insured against . . ." (Italics ours) suggests that three requisites should be present to constitute a loss, *i.e.,* an insurable interest, the occurrence of a contingent or unknown event, and the imposition of a loss upon the insured.

Section 301 of the same Code to the effect that "A change of interest in a subject insured after the occurrence of an injury which results in a loss, does not affect the right of the insured to indemnity for the loss" suggests there must be a personal loss calling for indemnification.

Section 2051 of the same Code to the effect that under an open policy "the measure of indemnity in fire insurance is *the expense to the insured* of replacing any loss or injury . . ." (Italics ours) also suggests that insured must sustain a loss calling for indemnification.

The landmark case of *Whitney Estate Co. v. Northern Assurance Co.,* 155 Cal. 521 (101 Pac. 911, 18 Ann. Cas. 512, 23 L. R. A. 123), establishes the rules for California where it states, commencing at the foot of page 523 of the California Report:

> "In their briefs the learned counsel for the respective parties present various authorities, but none of the cases cited on either side can be said to be closely in point. They are valuable in so far as they illustrate general principles of insurance law which must be looked to for the determination of the question before us. One of these principles—and the one upon which the respondent bases its position—is that a policy of insurance is a contract of indemnity. It is, as defined in section 2527 of the Civil Code, 'a contract whereby one undertakes to indemnify another against loss, damage or liability, arising from an unknown or contingent event.' Section 2551 provides that 'the sole object of insurance is the indemnity of the insured . . .' Policies 'executed by way of gaming or wagering' are void. (Civ. Code, sec. 2558.) 'The measure of an insurable interest in property is the extent to which the insured might be damnified by loss or injury thereof.' (Civ. Code, sec. 2550.) Accordingly, it is universally held that (except in case of a valued policy) 'the insured is entitled to recover under the policy only such loss as he has actually sustained, not exceeding the sum stipulated.' (16 Am. and Eng. Ency. of Law, p. 840.)"

**B. Attitude of Federal Courts When State Law in Doubt.**

The attitudes of the United States Courts of Appeals and of the United States Supreme Court are stated with complete clarity in the opinion in *Citizens Insurance Company v. Foxbilt, Inc.*, 226 F. 2d 641, discussed and quoted in the next section of this brief. As mentioned in that opinion the question for review is not whether the District Court reached a correct conclusion, but whether it reached a permissible one. If the question decided was doubtful under California law, the judgment must be affirmed.

The opinion of Justice Sanborn in *Buder v. Becker,* 185 F. 2d 311, is of interest, particularly because it discusses many decisions of the Eighth Circuit Court of Appeals and of the United States Supreme Court defining the province of the federal reviewing court in such circumstances.

The Honorable Court of Appeals which will review the matter at bar has indicated a like concept of the law in *People of the State of California v. United States* (decided 1956), 235 F. 2d 647.

It is submitted that the judgment of the District Court herein is not only consistent with but is literally in keeping with the fundamentals of California law last discussed.

**C. The Law in Support of the District Court's Judgment.**

Although the end result of the case was adverse to the insurance company, the opinion in *Citizens Insurance Company v. Foxbilt, Inc.* (8th Cir., 1955), 226 F. 2d 641, is strongly in point. The case involved a provision in a fire insurance policy insuring a lessee against loss caused

by fire to tenant's improvements and betterments in the leased premises. After the fire the lessor had repaired the damage at its own expense. The United States Court of Appeals affirmed the District Court's ruling allowing recovery to the insured, but appellee submits the opinion shows on its fact that a judgment for the insurance company also would have been affirmed. While the opinion should be read in full, appellee quotes from it as follows:

> "This Court is not an appellate court of the State of Iowa and establishes no rules of law for that State. The question for review in a case such as this is not whether the trial court has reached a correct conclusion, but whether it has reached a permissible one." (Citing many decisions by the same Court.)
>
> ". . . It is conceded that the Supreme Court of Iowa has not as yet decided the question which the District Court was called upon to decide. That it may be problematical whether the Iowa Supreme Court would reach the same conclusion in a similar case is of no help to the Insurance Company on this appeal. See Buder v. Becker, 8 Cir., 185 F. 2d 311, 315. If the question decided was a doubtful question of Iowa law as to which there can be a justifiable difference of opinion, the judgment must be affirmed.
>
> (2, 3) Under the law of Iowa, a fire insurance policy is a contract of indemnity by which the insurer agrees to indemnify the insured against loss or damage to the insured property by fire, not exceeding the amount of the insurance. (Citing cases.) Liability under the policy attaches on the happening of the loss. Washburn-Halligan Coffee Co. v. Merchants' Brick Mutual Fire Ins. Co., 110 Iowa 423, 81 N. W. 707, 708.

(4) The measure of damages under Iowa law, in the event of loss, is ordinarily the difference between the fair market value of the insured property immediately before the fire and its fair market value immediately thereafter, not exceeding the face amount of the policy nor the cost of repair and replacement. (Citing cases.)

(5) Since the liability of the insurer is for indemnity against loss to property and attaches on the happening of the loss and since the amount of the liability is determinable as of that time, it reasonably can be argued that the subsequent repair or restoration of the insured property by a third party without cost to the insured cannot relieve the insurer of its accrued liability. That is the law in some of the states."

After discussing cases such as those cited by appellant on pages 12 to 14 of her Opening Brief, in particular *Alexandra Restaurant, Inc. v. New Hampshire Insurance Co.*, 272 App. Div. 346, 71 N. Y. S. 2d 515, and *Foley, et al. v. Manufacturers' and Builders' Fire Insurance Co.*, 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664, the reviewing court recognized the authorities and decisions relied upon by appellee herein when it said, commencing on page 644:

"There is, however, respectable authority opposed to what, for convenience, may be called the New York rule.

"In 44 C. J. S., Insurance, Sec. 224, p. 933, it is said:

" 'Fire insurance is a personal contract with insured, and not a contract in rem, its purpose being not to insure property against fire, but to insure the owner of the property against loss by fire.'

"In 45 C. J. S., Insurance, Sec. 915, p. 1010, the text reads as follows:

" 'Since a contract for insurance against fire ordinarily is a contract of indemnity, as discussed supra Sec. 14, insured is entitled to receive the sum necessary to indemnify him, or to be put, as far as practicable, in the same condition pecuniarily in which he would have been had there been no fire; that is he may recover to the extent of his loss occasioned by fire, but no more, and he cannot recover if he has sustained no loss.'

"In support of the last clause of the text, the following cases are cited in footnote 22, 45 C. J. S., p. 1010: Beman v. Springfield Fire & Marine Ins. Co., 303 Ill. App. 554, 25 N. E. 2d 603; Patterson v. Durand Farmers Mut. Fire Ins. Co., 303 Ill. App. 128, 24 N. E. 2d 740; Ramsdell v. Insurance Co. of North America, 197 Wis. 136, 221 N. W. 654; Schultz, for Use of Whitlock v. Home Ins. Co., 205 Ill. App. 297; Larner v. Commercial Union Assur. Co., Limited, of London, England, 127 Misc. 1, 215 N. Y. S. 151; Marshall Spinning Co. v. Travelers Fire Ins. Co., 325 Pa. 135, 188 A. 839. In the Ramsdell case, supra, the Supreme Court of Wisconsin held that no loss recoverable under a fire insurance policy was sustained by lessors of a building where it was restored by the lessee, who was also insured and who recovered for the loss from his insurer. In the Schultz case, supra, it was held that the owner of a building under construction, which was completed by the contractor after a fire loss, could not recover from the insurer, since the owner had sustained no pecuniary loss.

"Appelman, in Insurance Law and Practice, Vol. 6, Sec. 3861, pages 207-208, says:

"'. . . If the damaged property is restored or repaired by a mortgagor or lessee, neither the mortgagee (citing Friemansdorf v. Watertown Ins. Co., C. C. Ill. 1879, 1 F. 68) nor the lessor (citing Ramsdell v. Insurance Co. of North America, 1928, 197 Wis. 136, 221 N. W. 654) would be entitled to recover from the insurer. A few cases have reached a contrary conclusion (citing Pink v. Smith, 1937, 281 Mich. 107, 274 N. W. 727; Savarese v. Ohio Farmers' Ins. Co. of LeRoy, Ohio, 1932, 260 N. Y. 45, 182 N. E. 665, 91 A. L. R. 1341).'

"Enough has been said, we think, to show that the question submitted to the District Court in the instant case was and is a doubtful question of Iowa law. The Iowa Supreme Court, were this case before it, might adopt the rule which prevails in New York or it might conclude that the rule contended for by the Insurance Company is the better one. The Insurance Company has not demonstrated, and we think it would not be possible to demonstrate, that the conclusion reached by the District Court was not a permissible one or that it was based upon a misapplication or misconception of the applicable law of Iowa."

Directly analogous to the case on appeal is the opinion in *Tauriello v. Aetna Insurance Co.* (N. J., 1951), 82 A. 2d 226. This was an action by the heirs of one Crescenzi on a policy insuring against loss by fire to certain property. The policy was endorsed to the heirs who brought the action, after the insured's death. Prior to the insured's death the State of New Jersey had contracted with him to purchase the property at a fixed

price and the purchase was consummated after the fire without abatement in price because of fire damage. The New Jersey court of review held the insured had sustained no loss under the policy and said:

> "The general rule is that a contract for insurance against fire is ordinarily one of indemnity under which the insured is entitled to receive indemnity or to be reimbursed for any loss that he may have sustained and cannot recover if he has sustained no loss. See 45 C. J. S., Insurance, Sec. 915, page 1009. In Draper v. Delaware . . . 91 Atl. 206, it was pointed out that a fire insurance policy is a contract not to insure the property against fire but to insure the owner against loss by fire, and that the insurance company can be called upon when, and only when, the insured has sustained a loss which under the terms of the policy calls for indemnification. The same rule finds support in Patterson v. Durand . . . 24 N. E. 2d 740 (1940).
>
> "In New Jersey the rationale of the cases cited below are in support of the above rule. In United Bond & Mortgage Co. v. Concordia Fire Insurance Co., 113 N. J. L. 28, 172 Atl. 373 . . . the court said: 'It was, of course, incumbent upon the plaintiff to show damages for which it was entitled to recover under the terms of its policy of insurance. This it failed to do. One who sues upon a contract must prove damages. The facts stipulated, as before indicated, negate damages to the plaintiff by reason of the fire, but on the contrary are eloquent of the fact that its loss occurred by reason of the foreclosure.' (Also citing Power Bldg. & Loan v. Ajax Fire Ins. Co. (N. J. L.), 164 A. 410.)"

In *Draper v. Delaware, etc.* (Del.), 91 Atl. 206 (cited in *Tauriello v. Aetna Insurance Co., supra*), the court said:

> "A contract of insurance is essentially a personal contract. (Citing Traders Ins. v. Newman.) It is not a contract to insure property against fire, but is one to insure the owner of property against loss by fire. Destruction by fire of the property described in the contract of insurance is not the contingency upon which the insurer promises to indemnify the insured. It is only when by fire the insured has sustained a loss that the insurer may be called upon to perform its contract of insurance."

Thus in *Ramsdell v. Insurance Co.,* 197 Wis. 136, 221 N. W. 654, cited throughout the opinion of the United States Court of Appeals in *Citizens Insurance Co. v. Foxbilt, Inc., supra,* and again in the New Jersey opinion *Tauriello v. Aetna Insurance Co., supra,* the owners of a building were held not to have sustained a loss under a fire insurance policy because the lessee, having recovered from his own insurance company, had repaired the building after the fire.

Also see the following cases cited by the court in support of its opinion in *Tauriello v. Aetna Insurance Co.:*

*Marshall Spinning Co. v. Travelers Fire Ins. Co.,* 325 Pa. 135, 188 Atl. 839;

*Schultz, etc. v. Home Insurance Co.,* 205 Ill. App. 297;

*Larner v. Commercial Union Assur. Co.,* 127 Misc. 1, 215 N. Y. Supp. 151.

The case of *Beman v. Springfield F & M Ins. Co.,* 303 Ill. App. 554, 25 N. E. 2d 603, is of interest. The ruling applied by the District Court herein was applied in this

Illinois case where an option to purchase the property given prior to the fire was exercised after the fire without diminution in price. The reviewing court reversed the trial court's ruling which had been in favor of the insured.

Also see:

*Palatine Insurance Co. v. O'Brien,* 107 Md. 341, 68 Atl. 484;

Cooleys Briefs on Insurance, 2d Ed., Vol. 1, p. 6.

In the case at bar the insured did not challenge the right of the County to exercise the power of eminent domain over her property [Tr. pp. 35-36]. For some time before and when the fire occurred she was bound to lose ownership of the property at the value determined or agreed upon in that action. She saw fit to agree that the value was $26,400.00 before the fire and she accepted that in full payment. It would seem of little importance when the agreement was dated, the important thing being that she agreed upon the value as of a time unaffected by the fire and received payment unaffected by the fire.

**D. There Was No Genuine Dispute in Material Fact Before the District Court.**

Appellee understands the rule in reference to summary judgments to be that a defendant may move for summary judgment when he believes he is entitled to a judgment either on the pleadings or on the basis of extrinsic facts established by affidavit, deposition or stipulation. See Rule No. 56(b), Fed. Rules of Civ. Proc., 28 U. S. C. A.; *Gifford v. Travelers Protective Association,* 153 F. 2d 209.

Appellee felt it was entitled to summary judgment under the pleadings and evidence once certified portions

of the record from the condemnation action were received in evidence as Exhibit "A." It is submitted that to attempt to show that a genuine dispute existed as to material facts, it was incumbent upon appellant at this point to present affidavits or offer evidence showing the existence of such a dispute. See *Lorentz v. RKO Radio Pictures* (9th Cir.), 155 F. 2d 84, cert. den., 67 S. Ct. 81, 329 U. S. 727, 91 L. Ed. 629. However, the appellant chose not to file affidavits or offer evidence in opposition to appellee's motion; instead, appellant filed her own motion for summary judgment [Tr. pp. 24-29] which is discussed in the next section of this brief. It will be noted that in connection with her motion for summary judgment appellant's effort was directed to an attempt to go behind the record of the condemnation case.

**E. Appellant's Motion for Summary Judgment Was Properly Denied.**

Before appellant's motion could be considered favorably, appellee's motion for summary judgment would have to be denied. Therefore, for the sake of this discussion, appellee will disregard the defense which was the basis for the granting of its motion.

Appellant's motion was in disregard of the fact that the policy in suit is an open policy, not a valued policy, and that appellant, therefore, has the burden of proving the extent of loss and damage to the subject matter of the policy. This hiatus in appellant's position begins with the absence of an allegation in her complaint as to the value of or the amount of damage caused the building which was the subject of the policy. This omission continues through appellant's objections to appellee's proposed Findings of

Fact and through her own motion for summary judgment. Appellant's sole reference to values or damage in any form is to the effect that in her answer to the complaint in eminent domain she alleged the value of the entire property on Bunker Hill Street, including improvements, to be not less than $75,000.00 [see affidavit in support of appellant's said motion, Tr. pp. 30-31]. Nowhere is there a statement or allegation of the alleged value of the insured building or of the cost of repair or replacement. The building may have been of little or no value; at least appellant has been silent thereon.

It is evident from these facts that in addition to appellee's affirmative defense, there was a genuine issue concerning a material fact, to wit, the amount of loss or damage caused the building by fire. Appellant offered nothing in connection with her motion to suggest that there was no genuine dispute as to this fact. Although there was nothing to refute, in an excess of caution appellee's counsel filed an affidavit in opposition to appellant's motion showing that there was a genuine issue concerning this fact. Through inadvertence this affidavit was not included in the record on appeal (although the entire record was designated), and appellee is now filing a supplemental designation requesting the Clerk of the District Court to forward the said affidavit for filing as part of the record on appeal. The affidavit is brief and appellee respectfully requests that this Honorable Court accept same as part of the record on appeal. Under the circumstances, appellee takes the liberty of having the affidavit printed as an appendix to this brief.

It is submitted as self-evident that appellant's motion for summary judgment was properly denied.

## Conclusion.

It is respectfully submitted that the orders and judgment of the District Court were proper and should be affirmed.

Respectfully submitted,

ANGUS C. MCBAIN,

MCBAIN & MORGAN,

By ANGUS C. MCBAIN,

*Attorneys for Appellee.*

## APPENDIX.

[Title of District Court and Cause]

AFFIDAVIT OF ANGUS C. McBAIN IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

State of California, County of Los Angeles—ss.

Angus C. McBain, being first duly sworn, deposes and says: That he is one of counsel of record for the defendant, Pearl Assurance Company, Limited, and is fully familiar with the issues herein and the evidence which would be offered by said defendant upon a trial of this case; that in behalf of said defendant affiant proposes to offer substantial testimony from well qualified expert witnesses to the effect that the improvements which were damaged and destroyed by fire on plaintiff's property on February 4, 1957, were of no value whatsoever at the time of said destruction in that said improvements were obsolete, dilapidated, run down, were in the nature of "slums," virtually constituted a nuisance and were in fact in process of being condemned by the County of Los Angeles, together with the entire property.

That said defendant challenges and in its answer on file herein has joined issue with plaintiff's allegation as to the value of said improvements and in the event defendant's motion for summary judgment were denied herein, there is a genuine and meritorious issue of fact still to be tried and decided.

/s/ ANGUS C. McBAIN.

Subscribed and sworn to before me this 13th day of February, 1958.

/s/ ELIZABETH PINNEY,
*Notary Public in and for said County and State.*